IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Brunswick Division

In the matter of:)
)
CONCRETE PRODUCTS, INC.)
)
Debtor)

Chapter 11 Case

Number 88-20540

MEMORANDUM AND ORDER
ON MOTION OF HAROLD ZELL TO REMOVE TRUSTEE

The above-captioned Motion was filed July 26, 1990, and scheduled for hearing in Brunswick, Georgia, on October 11, 1990. After consideration of the evidence adduced at that time, after taking judicial notice of previous proceedings in this case, together with argument of counsel and consideration of all applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Chapter 11 case was filed on October 3, 1988. The

Debtor's president and chief executive officer at the time the case was filed was B. E. Bledsoe. In that capacity, Bledsoe actively participated in the preparation of the Chapter 11 petition and accompanying schedules.

An examination of the schedules reveals that Bledsoe was not scheduled as the holder of any claim against the Debtor corporation (Exhibit P-1). He executed a summary of debts and property incorporating Schedules A and B to the bankruptcy petition on October 14, 1988, under penalty of perjury, without revealing his status as a creditor. On January 20, 1989, an adversary proceeding styled Minter et al. v. Directors of Concrete Products et al., No. 89-2001, was filed. In that adversary proceeding the Plaintiffs sought a interlocutory and permanent injunction against the Board of Directors to restrain the termination of Mr. Bledsoe's services as president and chief executive officer rendered pursuant to the terms of a written employment contract. After an evidentiary hearing this Court entered an Order on January 27, 1989, pursuant to which I preliminarily enjoined Defendants "from taking any action to terminate the employment of B. E. Bledsoe or diminishing his duties as chief executive officer of Concrete Products, Inc., as set forth in paragraph four of his employment contract (Exhibit P-1)

until further order of this Court." That Order recognized that in order to grant a preliminary injunction it was necessary to find both a substantial likelihood that the Plaintiffs would prevail on the merits and a substantial threat of irreparable harm. The Order recognized that the right of the Board of Directors to govern a debtor corporation is a prerogative ordinarily uncompromised by reorganization unless there is a clear showing of abuse or mismanagement. I ruled that the determination of clear abuse turns on whether rehabilitation of the corporation would be seriously threatened by the action which is at issue. I concluded that based on the evidence available at that point, the termination of Mr. Bledsoe, a longtime key employee of the corporation, by a newly elected Board of Directors in possible violation of a written contract of employment would seriously threaten the reorganization.

Accordingly, I preliminarily enjoined his termination but further specified that the Board "is not enjoined from acting and indeed continues to have the authority granted to it by Georgia law . . . . Bledsoe and the board jointly are responsible for fulfilling the duties of the debtor-in-possession . . . . this Court well recognizes the potential difficulty of these parties operating harmoniously . . . . If they are unable to discharge that duty in

harmony and in the best interest of all shareholders and creditors of Concrete Products, Inc., this Court will not hesitate to appoint an examiner or trustee to mediate or run the business . . . . I specifically reserve the right to appoint such examiner or trustee with or without notice to the parties as such circumstances warrant."

On March 9, 1989, the Plaintiffs in the same adversary proceeding filed a Request for Injunction, Motion for Contempt and for the Appointment of a Trustee, alleging that there was interference by one or more of the directors of Concrete Products with the efforts of B. E. Bledsoe to fulfill his responsibilities as president and chief executive officer that rose to the level of contempt of court. A hearing on that Motion was held on March 15, 1989. The evidence revealed that there had been considerable conflict between Bledsoe and the Board notwithstanding the admonition to all parties contained in the January Order. In closing arguments, counsel for Harold Zell and counsel for Bledsoe both expressed their belief that the January Order needed to be amended to further define the specific areas in which the board or Bledsoe might have exclusive authority to operate. The Court took the question of contempt under advisement and gave the parties one

week to agree upon a division of responsibility or to narrow those areas where the Court needed to delineate respective spheres of authority. The Court was subsequently informed that relations between Bledsoe and the Board had improved to the extent that no purpose would be served by further clarification of the January Order. Subsequently, on April 13, 1989, hearings were conducted on a number of Motions in the case including Debtor's Motion for Extension of Time for Filing its Plan and Disclosure Statement and a Motion to Convert the Case filed by the United States Trustee. At that hearing, direction from the Court was sought by a party which was attempting to negotiate the purchase of a major asset of the Debtor (the Debtor corporation's stock in Brunswick Foreign Trade Zone) as to who had the authority to enter the corporation into a binding contract of sale. I stated that I would consider entering an Amended Order to clarify this question and indicated that the obvious ongoing conflict between Bledsoe and the Board again raised the issue as to whether conversion or appointment of a trustee was appropriate. The parties were again advised on the record that the right to appoint a trustee without additional notice was being reserved.

Thereafter on April 26, 1989, an Amended Order was entered defining the scope of power of the Board of Directors to include "all matters of corporate governance including the extent to which the debtor-in-possession will continue to manufacture and sell products and/or assets and all other matters consistent with [Georgia] law." The Order further provided that Bledsoe remained chief executive officer pending further hearings on the application for an injunction but specified that his powers extended only to "the implementation of decisions of the board and supervision of day-to-day operations within parameters set by the board."

On May 1, 1989, Plaintiffs in the adversary filed a Motion for Reconsideration of that Amended Order and sought an emergency hearing. The Motion alleged that on April 21, 1989, the Board had decided to discontinue the manufacture of certain products, despite the existence of outstanding contracts for them of approximately $437,000.00 and the willingness of some customers to advance the necessary funds for their manufacture. In his cover letter transmitting the Motion and requesting the emergency hearing, Bledsoe's counsel asserted that just prior to the entry of the Amended Order, Bledsoe had obtained a "highly favorable order for Permadeck from Bates and Associates of Bainbridge, an established

and loyal Concrete Products, Inc., customer. This order would be expected to produce $170,000.00 to $200,000.00 in profit and Bates and Associates has offered to advance the working capital needed to fund Concrete Products, Inc.'s performance." The Motion to Reconsider set forth that the Board of Directors was "committed to the liquidation of the Debtor without regard to the impact upon creditors and shareholders and without regard to the feasibility of the successful reorganization of the Debtor."

In the meantime, Bledsoe had filed a Proposed Disclosure Statement and Plan of Reorganization on April 24, 1989. The Motion to Reconsider pointed out that the March Profit and Loss Statement showed a dramatic turnaround in the Debtor's business and that the Board of Directors which had failed to file its own plan of reorganization "should not be allowed to sabotage the plan for reorganization filed by B. E. Bledsoe and thereby prevent its consideration by all interested parties." Upon consideration of the Motion for Reconsideration and for an Emergency Hearing this Court conducted a hearing by telephone conference on May 4th, with all interested parties represented, when the fundamental dispute between the Board and Bledsoe regarding the degree of profitability of the contract for new business and the desirability of continuing the

company in operation remained unresolved.

The Board, through counsel, again expressed its position that the company should immediately be shut down and liquidated. Bledsoe, through counsel, argued that the profitable contract should be entered into and that if said contracts were not accepted, the feasibility of the plan proposed by Bledsoe for consideration of all shareholders would be seriously jeopardized. I then entered an Order on May 5, 1989, finding that the ongoing struggle between the Board and Bledsoe was working to no one's benefit because the parties were repeatedly returning to Court to obtain what amounted to business judgments. I concluded: "It is only in extreme and rare situations that the Court will interfere with what is ordinarily within the realm of corporate governance. By restraining the Board of Directors from firing Mr. Bledsoe it was not the intention of this Court to put itself in the position of making ongoing business judgments nor is it my proper role. Ordinarily, a decision whether to continue operations would fall within the Board's realm of responsibility. However, with competing plans pending consideration by the creditors and shareholders, an independent assessment of how the corporation should be operated is essential." I therefore concluded "circumstances in this case

indicate that no other alternative [other than the appointment of a trustee] is possible at this point." The United States Trustee thereafter selected James D. Walker, Jr., and by order entered May 5, 1989, I approved that appointment.

On June 22, 1989, a Motion to Remove Trustee was filed by Carley Zell and denied by Order entered August 29, 1989. On July 5, 1989, a Motion was filed to set aside the Temporary Restraining Order preventing the Board from terminating Bledsoe. I ruled on August 29, 1989, that the Motion was moot. Since a Trustee was then operating the Debtor's business I found that any decision regarding Bledsoe's continued employment was vested in the Trustee.

Following his appointment, the Trustee made continual efforts to improve the record-keeping and accounting systems of the Debtor in order to gain the information necessary to determine whether operation of the business should be continued. After approximately nine months operation by the Trustee, a continued hearing on the Motion to Convert of the United States Trustee was held on February 20, 1990. Following a lengthy evidentiary hearing, I entered an Order on February 27, 1990, denying the Motion to Convert. The Order set forth that over the nine month period

following the appointment of the Trustee, it appeared that the company had sustained only a marginal loss of approximately $1,400.00 on its operations. Since the Debtor was not servicing any debt or making rental payments to the Port Authority from which it leased its plant facilities, I recognized the profit and loss figures were unrealistically favorable at least to the extent that future lease and debt service payments would be required. Nevertheless, I concluded that grounds for conversion did not exist under 11 U.S.C. §1112(b).

Based on the evidence before me then, it was not clear that there was any continuing loss to the estate nor was there evidence that any creditor had been prejudiced during the pendency of the case. Moreover, the only creditor (Zell) who appeared and participated in the hearing stated at the conclusion of the evidence through counsel that he was uncertain whether conversion was in the best interest of creditors based on the evidence before the Court. Indeed I was unable to conclude that conversion was "in the best interest of creditors and the estate." I therefore denied the Motion to Convert and instead ordered the Trustee to either file a Disclosure Statement and Plan by March 15, 1990, or to file a statement setting forth why he would not do so and make further

recommendations as to dismissal or conversion.

I further stated in that Order that all parties in interest continued to have the right to file their own Disclosure Statement and Plan if they chose to do so. Shortly after the entry of that Order, the Trustee circulated a rough draft of a Disclosure Statement and Plan to all interested parties. The Trustee solicited and subsequently received substantial input from all interested parties concerning errors, omissions or suggestions for improvement in both the Disclosure Statement and Plan and filed his initial Disclosure Statement incorporating many of the suggested changes on March 15, 1990, as amended March 27, 1990. A hearing to consider approval of the Disclosure Statement was scheduled July 2, 1990, at which time a number of objections were raised. The Court directed that the Trustee file an Amended Disclosure Statement by July 16, 1990, and afforded counsel for Mr. Zell until July 30th to file his own Disclosure Statement and Plan should he desire to do so. On July 10, 1990, the Trustee filed his Amended Disclosure Statement. On August 1, 1990, the Disclosure Statement proposed by Harold Zell was filed with this Court.

Notwithstanding the fact that Bledsoe was not listed as a creditor when this case was filed, on September 20, 1989, counsel for Bledsoe conferred with the Trustee concerning the filing of a late claim in the case arising out of the assertion by a creditor of the existence of a deficiency claim against the company which was guaranteed by Bledsoe and with respect to which he had granted a secondary deed to secure debt on his personal residence (Exhibit M-2). On January 12, 1990, two proofs of claim were filed on behalf of Bledsoe, one in the amount of $50,000.00 representing that guarantee obligation and a second in the amount of $33,207.22 for monies allegedly advanced by Bledsoe to cover pre-petition operating expenses of the Debtor (Exhibit M-3). On January 20, 1990, the Trustee reviewed the claims filed on behalf of Bledsoe in this case. The Disclosure Statement filed by the Trustee on July 10, 1990, revealed that Bledsoe would be granted 40% of the stock of Debtor in partial consideration for his signing an employment contract to remain as President of Concrete Products, Inc., and would participate in the plan in the same manner as creditors and shareholders. As a result of distributions to be made under the plan if approved, he would ultimately hold approximately 47% of new issued Concrete Products, Inc., stock.

The fact that Bledsoe had filed a claim after the bar date was not revealed in the March Disclosure Statement but was subsequently revealed at the July 2nd Disclosure Statement hearing and was incorporated into the Trustee's Amended Disclosure Statement filed on July 10th. Evidence on July 2nd also revealed that according to Debtor's internal books and records Bledsoe owed the corporation $20,000.00 on the filing date on an obligation he incurred for purchase of Concrete Products stock several years prior. I determined at the July 2nd hearing that the obligation for the purchase of the stock originated in the amount of $100,000.00 and was reduced several years prior to the filing of this Chapter 11 to the sum of $60,000.00. Thereafter, a memorandum was entered on the books of the company within one year of the filing of this case showing that an additional $40,000.00 credit was to be given Mr. Bledsoe and applied to reduce his debt to the $20,000.00 shown on the company's books as of the date of the filing of this case. The memorandum reflected that it was commemorating a transaction which had occurred, however, in September, 1987, a time more than one year prior to the filing of this Chapter 11 case.

The essence of the evidence in support of the petition to remove the Trustee is that the Trustee has shown favoritism to

Bledsoe in his capacity as Trustee. This is alleged to be evidenced by the fact that the March, 1990, Disclosure Statement did not reveal that the claims of Bledsoe were filed after the bar date, that there was a possibility of setting aside the $40,000.00 credit which was entered on the books within one year of bankruptcy as a voidable preference,[1] because the Trustee had not taken steps to

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[1] 11 U.S.C. Section 547(b) reads in relevant part:

> In this section . . .
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> (b) . . . the trustee may avoid any transfer of an interest of the debtor in property--
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> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made--
>
> (A) on or within 90 days before the date of the filing of the petition; or
>
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if--
>
> (A) the case were a case under chapter 7 of this title;

collect the $20,000.00 due from Bledsoe as shown on the company's books, and because the Trustee's Plan proposed what was alleged to be an unreasonably favorable contract to employ Bledsoe if the plan were confirmed.

The Trustee did not dispute that the existence of any impropriety in actions that he took or the appearance of impropriety in his actions would justify removal of the Trustee under 11 U.S.C. Section 1106 which provides that a trustee can be removed "for cause". He contends, however, that any deficiency in the Disclosure Statement was a result of oversight or the result of a judgment call on his part as to the likely outcome of any litigation between himself as Trustee and Mr. Bledsoe. He admitted that the $20,000.00 shown on the company's books as owed by Mr. Bledsoe should have been revealed in the March Disclosure Statement. With respect to the $50,000.00 claim, the Trustee believed that since the liability of Mr. Bledsoe was contingent at the time of filing, the Court could and would excuse his lack of timeliness since the existence and

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(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

amount of that claim was not asserted against Bledsoe prior to the time that the bar date ran. With respect to the alleged $40,000.00 preference, the accountant's entry showing a credit given on a date within one year of bankruptcy would not, in the Trustee's analysis, authorize the determination that the giving of the credit constituted a preference when that decision was made outside the one-year preference period.

The July 10th Disclosure Statement was in fact erroneous in stating that the Bledsoe claim was $87,500.00 as opposed to $83,207.22. The July 10th Disclosure Statement also erred in describing the claim as "arising from pre-petition advances made by Bledsoe" when $50,000.00 of the total constituted a guaranty obligation which Bledsoe undertook to assist the Debtor but which he has yet to pay. However, it did reveal that the Bledsoe claims were filed after the bar date and stated that the claim would be objected to by the Trustee and that a determination of whether any of the claim would be allowed was a matter for the Court to decide. The Amended Disclosure Statement further shows the $20,000.00 indebtedness of Bledsoe to the company and the fact that "the most recent $40,000.00 credit was entered on the company's books within one year prior to the filing of the bankruptcy petition." The

Amended Disclosure Statement indicates that the Court instructed the Trustee to investigate that transaction further to determine if the transaction constituted an avoidable preference. At the hearing held on October 11, 1990, the Trustee informed the Court and all parties that a preference action had subsequently been instituted against Bledsoe.

In light of the foregoing, I am unable to conclude that there is any misconduct on the part of the Trustee in the manner in which he disclosed the claims and setoffs as between Bledsoe and the corporation such as would constitute cause for the Trustee's removal. There is a mathematical error of slightly over $4,000.00 in stating the amount of the Bledsoe claim and a mischaracterization of the origin of that claim to the extent that Bledsoe has not actually made good on his $50,000.00 guaranty. However, the $4,000.00 error is hardly a material discrepancy. It represents only approximately 5% of the amount of that claim and less than 3/10ths of 1% of all the priority and general unsecured claims known to exist in this case. Most important, however, is the fact that the Trustee revealed that he would object at the appropriate time to the allowance of the Bledsoe claim based on timeliness and that the determination as to whether the claims would be allowed was for

the Court's exclusive decision. Moreover, the Trustee, although still harboring reservations as to whether the $40,000.00 credit given to Bledsoe and recorded on the company's books within one year of bankruptcy constitutes a preference, has now initiated an action to set aside the giving of that credit as constituting an avoidable preference. Thus, I find this portion of the Trustee's Amended Disclosure Statement to contain adequate information as required by 11 U.S.C. Section 1125(a) in light of the nature and history of the Debtor and the condition of its books and records, to enable creditors to make an informed judgment about the Trustee's Plan. Since I find the Disclosure Statement in this regard to contain adequate information, the failure to be more precise in the description of the origin of the Bledsoe debt or in failing to state the precise amount of that claim does not constitute cause for removal of the Trustee, particularly in view of the fact that the allowance of the claim is a matter the Trustee has not conceded and intends to bring before the Court for resolution.[2]

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[2] I observe that in analyzing claims the Trustee is on the horns of a dilemma. If his Disclosure Statement assumes the disallowance of the Bledsoe claim or success in a preference action, later allowance of that claim by the Court, or an adverse ruling on the preference issue, dilutes the projected dividend to unsecured creditors. If he assumes that claim to be allowed, or discounts the recoverability of a preference, he is charged with favoritism to Bledsoe.

The Movant also asserts that the alleged favorable treatment accorded the Bledsoe claim by the Trustee is only one of a series of acts by the Trustee which reveal that the Trustee is showing favoritism to Bledsoe vis-a-vis the Board of Directors of the Debtor corporation. As evidence of that allegation, the Movant shows that the Trustee's Plan of Reorganization proposed that Bledsoe be granted a contract of employment with the Debtor corporation to serve for the life of the plan at an annual salary of $60,000.00, and that he would be given 40% of the newly issued stock in the reorganized corporation. That forty percent, together with the stock that would have been issued to him in consequence of his status as an existing shareholder of Concrete Products and his status as a creditor, in whatever amount was ultimately allowed, could have resulted in Bledsoe receiving as much as 47% of the stock of the corporation. The Movant alleges that this extraordinarily favorable treatment accorded Bledsoe is further evidence of the Trustee's failure to handle his duties in an evenhanded way.

The Trustee, in Court, provided a detailed rationale for his decision to propose a plan employing Bledsoe which was also summarized in his Amended Disclosure Statement filed on July 10,

1990, at pages 14-15. In essence, the Trustee perceived his obligations following his appointment as follows: (1) To determine whether the record keeping of the company was sufficiently reliable to formulate a plan of reorganization; and (2) to determine whether the company could be made profitable enough to justify the submission of a plan of reorganization; or (3) to determine whether the company should be liquidated. After the Trustee employed an accountant and determined that the company's records were sufficiently reliable to form a basis for analyzing the prospects of reorganization, the Trustee made a personal judgment that the corporation could conceivably service its debt over an extended period of time, remain profitable, and continue to operate in business gainfully employing persons in this district. The Trustee concluded, however, that it would be impossible to find someone with the expertise to run the company who was an outsider given the dire financial straits the company was in. Since Bledsoe had many years of experience in that position, the Trustee proposed that Bledsoe be employed at a lower salary than he might otherwise command, with stock in the company as additional consideration.

I find the Trustee's explanation as to the rationale for his proposed plan to employ Bledsoe and compensate him with salary

and stock to be entirely supportable as the best available reorganization plan he could devise. The Trustee could have proposed a liquidation absent the services of Bledsoe, but it has not been shown that other equally experienced management could be hired by the Trustee at less cost to keep the company operating during its reorganization.

This Court set a deadline for the Trustee to either propose a plan and allow creditors to make the decision whether to permit the company to remain in business or to shut the company down and recommend conversion of the case. The Trustee filed a plan in a timely fashion in accordance with those instructions. The Trustee made his decision to file a Plan of Reorganization shortly after this Court, following an extended evidentiary hearing, had concluded that the case should not be converted (see Order dated February 27, 1990). As previously indicated, this Order made it clear that the company was in serious financial straits but that it was operating on close to a break even basis and that if it could generate additional revenues once a plan was confirmed, it was anticipated that the company could service its debt and succeed.

The United States Trustee had strenuously pressed for conversion of the case at the close of that hearing. The Court was unconvinced and indeed the Movant was unconvinced that conversion was in the best interest of creditors at that time. Against that background and because whatever losses the company suffered immediately after the entry of that Order were foreseeable in view of the seasonal nature of the business, I find that the Trustee reasonably concluded a Plan of Reorganization should be offered to the creditors which, if supported, would leave the company in operation, and if not, would have resulted in conversion of the case and liquidation of all assets. The Trustee's rationale in proposing his Plan is imminently reasonable in view of all the circumstances of this case. It was strictly in the hands of creditors to determine whether they had sufficient faith in Bledsoe and his projections as to the future profitability of the company to confer upon him the control he would have held as a 47% shareholder. Every material fact was revealed to the creditors in the Trustee's Amended Disclosure Statement and Plan concerning the employment relationship of Bledsoe. Accordingly, I can find no evidence of favoritism in the proposed employment arrangement of Bledsoe.

It is further important to note that as soon as the Trustee determined that the profitability figures for late spring and early summer of 1990 were not sufficiently favorable to justify the continued operation of the company, by letter dated August 27, 1990, he withdrew his proposed Disclosure Statement and Plan and advised that the company would be winding down its business, ultimately to be liquidated.

It is erroneous to assume that, merely because the Trustee may have supported one party's position over another, the Trustee is "showing favoritism." Nor do the facts support any assertion that the Trustee has consistently favored one party over another. At the hearing on the United States Trustee's Motion to Convert, the Chapter 11 Trustee, the Movant, and Bledsoe were all in accord that the company should not be placed in liquidation. However, when the Chapter 11 Trustee made application to sell certain assets of the company located in Terry, Mississippi, the application was supported by the Movant and opposed by Bledsoe. It is clear that there has been no pattern which demonstrates that the Trustee has consistently adopted the position urged by Bledsoe. Even if that were the case, however, it would be insufficient to prove, in and of itself, that in so doing the Trustee failed to make

an informed and fairminded business judgment concerning the future of the company. Movant has utterly failed to show favoritism or negligence by the Trustee such as would support the Trustee's removal "for cause."

Movant has also asserted that an action for damages against the Trustee is contemplated. If it could be shown that the Trustee had engaged in such conduct as would give rise to liability on his part for damages in the conduct of his duties, cause for dismissal would certainly be shown. However, on the record before me there is no such showing even on a preliminary basis that the Trustee is subject to any liability. To the extent that this Court has ruled on individual actions of the Trustee or ordered that the Chapter 11 continue, the Trustee has absolute immunity. See Boullion v. McClanahan, 639 F.2d 213 (5th Cir. 1981). (Court appointed trustee in bankruptcy is an arm of the court, and, having sought and obtained court approval of his actions, was entitled to derivative judicial immunity for those judicially approved acts). See also Wickshorn v. Ebert, 585 F.Supp. 924, 934 (E.D.Wis. 1984) (Judicial immunity not only protects judges against suit from acts done within their jurisdiction, but also spreads outward to shield public servants, including trustees in bankruptcy); In re Tucker

Freight Lines, Inc., 62 B.R. 213, 217 (Bankr. W.D.Mich. 1986) (A trustee in bankruptcy has immunity if his actions are within the scope of the authority conferred upon him by statute or the court).

In Weissman v. Hassett, 47 B.R. 462 (S.D.N.Y. 1985), the court found that a court appointed trustee conducting his statutory duties under the Bankruptcy Code is absolutely immune from common law tort liability arising from statements contained in an investigation summary submitted to the Court. The trustee had conducted an investigation of the business affairs of the debtor corporation as mandated by 11 U.S.C. Section 1106 and submitted a statement of his findings to the court. The statement contained certain allegations regarding questionable insider transactions between the president of the debtor corporation and his brother. The brother and his family sued the trustee for libel, intentional infliction of emotional distress, and intentional interference with business relations. The trustee moved to dismiss for failure to state a claim upon which relief may be granted under Fed.R.Civ.P. 12(b)(6).

In sustaining the trustee's motion, the court noted that, although a trustee's position will not immunize him from suit

for torts committed in conducting the business affairs of the debtor corporation,[3] where the trustee is acting at the court's behest or under its supervision and subject to its orders, he is clothed with absolute immunity. The court focused upon the chilling effect which the absence of immunity for discharge of a trustee's official duties may have, noting:

> Sound policy also counsels immunizing the defendant. Absolute immunity is essential because as Judge Learned Hand noted, 'to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties' . . . . On the other hand, the court's holding will not encourage vindictive and overzealous bankruptcy trustees to abuse their powers. Safeguards within the Bankruptcy Code effectively check such abuses. For example . . . the bankruptcy court must approve the trustee's compensation. [Further], section 324 . . . authorizes a bankruptcy judge to remove

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[3] The court cited Mosser v. Darrow, 341 U.S. 267, 71 S.Ct. 680, 95 L.Ed. 927 (1951) for the proposition that a trustee may be liable for torts committed in conducting the business affairs of a debtor corporation. Mosser involved a trustee who had knowingly allowed persons in his employ to profit from trading in securities of the debtor's subsidiaries. In holding the trustee liable, the court was careful to note that the trustee's acts were intentional and not the result of mere negligence. Mosser does not, however, suggest that a Trustee is liable, in the absence of fraud or willful tort, for losses suffered by the business he is operating.

a trustee for cause.

The Movant concedes that there is no fraud or intentional wrongdoing by the Trustee. As to any alleged negligence in the operation of this business, the Trustee is not liable for losses sustained by the business. Cf. Collier on Bankruptcy ¶721.05[2]. As the Court in McClanahan noted, if the Movant felt that any act of the Trustee was wrongful or erroneous, the proper course would be to seek review of the specific act, a course open to it as a matter of right. 639 F.2d at 214.

Accordingly, I find that none of the grounds relied upon by Movant for removal of the Trustee have been established and under the theory of the case asserted by the Movant I deny the Motion.

There is, however, an additional basis upon which the services of the Trustee may be concluded. The Trustee's appointment was an attempt to prevent incessant skirmishing between Bledsoe and the Board which I had found, on a preliminary basis, threatened the prospects of successful reorganization. Specifically, the Trustee was appointed at a time when Bledsoe, who was propounding a plan of his own, believed that the company could

remain in business profitably while the Board felt that it could not and that it should shut down. The Trustee was appointed in large measure to operate the business, analyze the prospects for reorganization, and make a recommendation to the Court and to creditors as to which of these two courses to follow. For the first several months of his appointment, the condition of the company's books and records was wholely insufficient for the Trustee to make any such determination. Thereafter, the decision as to whether to leave the company in business was taken out of his hands by virtue of the entry of my Order dated February 27, 1990, which denied the Motion of the United States Trustee to Convert. Thereafter, at the Court's direction, the Trustee proposed a Plan of Reorganization which he withdrew when the performance of the company proved inadequate to fund a successful longterm Plan of Reorganization. The Trustee has now made clear to all interested parties his intention to let the company wind down operations and to thereafter file a Motion to Convert the case to a Chapter 7 case for liquidation.

In view of the central reasons for the Trustee's appointment and the current posture of this case, I now conclude that the Trustee has successfully fulfilled the essential purposes

of his initial appointment. He did, in fact, maintain some degree of peace between warring factions so that the company could operate for a sufficient period of time to enable interested parties to decide whether it could be successfully reorganized. He did ultimately reach the conclusion that the company should be liquidated thus resolving the initial philosophical dispute between Bledsoe and the Board which formed the basis for so much of the acrimony early in this case.

The Board now expresses a desire to reassume management of the company and attempt to liquidate it under the auspices of a Chapter 11 liquidation plan or possibly thereafter a Chapter 7 liquidation. The continuing expense that the estate will incur by the services of a Trustee as opposed to the services of its Board of Directors in an orderly Chapter 11 liquidation is no longer necessary. I conclude, therefore, that while the services of the Trustee have been of immense value to the Court, to the Debtor, and to creditors of the estate, the essential purpose for the services of a Chapter 11 Trustee in this case no longer exists. Accordingly, the Trustee is excused from of any further responsibility in this Chapter 11 case, with profound thanks from the Court for his services.

All matters of corporate governance are restored to the Board of Directors of Concrete Products, Inc., effective upon the date this Order becomes final. By separate order, the preliminary injunction issued in the related adversary proceeding will be vacated inasmuch as there are no remaining prospects for reorganization and the underlying reasons for entry of that preliminary injunction no longer exist.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 2nd day of November, 1990.